Court, U.S.
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In the

Supreme Court of the United States

Judy Allen,

Petitioner,

v.

City of Pocahontas, Arkansas; Pocahontas Housing Authority; James Black, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Mike Dunn, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Max Oakley, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Hite Tiner, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; S.L. Tyer, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Carolyn Loggains,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner's rehiring immediately after her first termination a sham, so procedural errors could be corrected in her second termination?

2. Should the resignation of the Chairman of the Housing Authority Board of Commissioners, in protest over Petitioner's termination, be considered concerning the credibility of the Housing Authority's reasons for termination of Petitioner?

3. Are the lower courts' decisions unconstitutional in that they rest on interpretation of the "judicial power" of the United States whose limits are set by Article III of the United States Constitution?

4. Does a 17-year veteran employee have a Fourteenth Amendment "property" interest in her employment, thereby entitling her to due process?

5. Should Petitioner be allowed to rely on *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148 (2003), which was decided after her decision in the district court?

6. Was Fed. R. Civ. Pro. 56 applied arbitrarily?

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit was denied on September 17, 2003 and is reprinted at App. 15a. No citation is available at this date. The August 15, 2003, Eighth Circuit panel opinion is reported at 340 F.3d 551 (8th Cir. 2003) and is reprinted at App. 1a. The March 19, 2001 and March 11, 2002, orders of the United States District Court for the Eastern District of Arkansas, Jonesboro Division, are reprinted at App. 16a and App. 56a, respectively.

JURISDICTION

The Eighth Circuit issued its *en banc* opinion on September 17, 2003. The petition for certiorari is timely in that Petitioner has filed it within 90 days of September 17, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

I. Section 1983

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

II. Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court may grant summary judgment only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56, quoted in *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986).

III. First Amendment to the U.S. Constitution

Freedom of Speech

IV. Fourteenth Amendment to the U.S. Constitution

Due Process

V. Arkansas Code Annotated § 5-53-112

Ark. Code Ann. § 5-23-112 makes retaliation against witnesses, informants or jurors a Class A misdemeanor.

VI. Article III of the U.S. Constitution

Separation of Powers

VII. Article IV §2 of the Arkansas Constitution of 1874

Separation of Powers

STATEMENT

I. Background of the Case

Petitioner, Judy Allen, was hired in March of 1980 by Respondent, Pocahontas Housing Authority, ("Housing Authority"), as a maintenance person. She worked intermittently for seventeen and one half (17½) years for the Housing Authority, when on February 5, 1997, she was discharged by the Director of the Housing Authority, Respondent Carolyn Loggains, without notice or hearing, in violation of policy and procedures of the Housing Authority.

Prior to Allen's discharge, she had been subpoenaed to testify against Carolyn Loggains concerning a matter of fraud and wrongful eviction of a tenant of the Housing Authority. Petitioner Allen contends that her discharge by Loggains was for her testimony against Loggains concerning fraud and a petition she circulated on behalf of herself and the tenants of the Housing Authority.

After being terminated, Allen complained immediately to the Board of Commissioners of the Housing Authority. The Board of Commissioners of the Housing Authority consulted with officials of HUD. Approximately five (5) weeks from the date of her discharge, March 12, 1997, Allen was reinstated to her

position by the Board of Commissioners based on the advice of the officials of HUD. Soon after the reinstatement of Allen to her position, Board of Commission member and Acting Director, Respondent, S.L. Tyer, terminated her a second time, on May 21, 1997, for the alleged reason of insubordination and alleged tenant complaint. (The only tenant who is alleged to have complained was a thief who stole Allen's petition and who had himself been convicted of harassment along with other miscellaneous charges.) Allen alleges that the notice of termination was again without notice or hearing.

Subsequent to the notice of discharge by Board of Commission member and Acting Director, Appellee Tyer, a grievance hearing was held wherein Board of Commission members, Respondents James Black, Mike Dunn, Hite Tiner, Max Oakley and S.L. Tyer, affirmed the discharge of Allen by Respondent Tyer.

Elwood Smith, Chairman of the Housing Authority Board of Commission, resigned his position in protest of Allen's discharge. Smith stated that the Board put Allen back to work so that they could fire her legally. He further stated that he felt like Respondent Loggains was the main problem. Smith testified as follows:

> Q. You've already talked about the statements that you got from everybody. When you investigated this discharge, I think you've already stated you determined that Ms. Loggains was the problem, that she couldn't get along with office help and it wasn't Mrs. Allen. Is that still your feelings?

A. That was part of it.

Q. Do you remember telling me that the board made a rule or changed a rule after Mrs. Allen was fired the first time? The Board made a rule that an employee couldn't work under their spouse? Do you remember telling me that the Board made that rule after Mrs. Allen was fired?

A. Yes.

Q. And you remember telling me that you thought the Board made the rule so they could discharge Mrs. Allen the second time?

A. Yes, that was my opinion of it.

Q. Do you remember whether anyone on the board actually said that we'll change the rules? We'll let her work a while and then release her from her job or was that just your opinion?

A. No. Some of the board members said that in a board meeting.

Q. Do you remember who said that?

A. I believe it was S.L. Tyer, but I'm not sure about that now.

Q. But you do know some of the board

members said that?

A. Yes, that's right.

Q. Do you remember telling me that the Board just put Allen back and this was your opinion that the Board put Allen back so that they could fire her legally?

A. Yes.

Q. Is that your opinion today?

A. Yes.

Q. I believe you told me that you resigned in protest on account of that rule?

A. Yes. That's the main thing right there.

Q. I believe you told me that you felt like Carolyn Loggains was the problem or the main problem. Is that correct?

A. Yes.

Q. And you feel like that today?

A. Yes.

(Carolyn Loggains resigned soon after Allen's termination.)

Allen filed her Complaint pursuant to Title 28, United States Code, Section 1343, this being a suit authorized by law to redress the deprivation under color of law, statutes, regulation, custom, and usage of the state of rights, privileges, and immunities secured by the laws and Constitution of the United States. Allen specifically claimed the right to proceed under Section 1983 of Title 42 of the United States Code, Section 215 of Title 29 of the United States Code, (Fair Labor Standards Act) 42 U.S.C. § 1985. Allen seeks to enforce the First and Fourteenth Amendments to the Constitution of the United States, which guarantees the right to free speech and due process and 42 U.S.C. § 1985.

Allen also based her action on the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq, (ADEA), as amended by 42 U.S.C. 6101, the Civil Rights Act of 1991, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., including, but not limited to, §703.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals' decision "has so far departed from the

accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's supervisory power . . . ."

All of these considerations are present in this case.

The failure of the lower courts to discuss Chairman of the Board of Commission, Elwood Smith's, resignation in protest over Allen's second termination raises questions concerning the logic of their conclusions. The lower courts hinge their decisions on the "interruption" caused as a result of the conduct of a thief, Kenneth Clark Evans, and totally ignore the protest by Chairman Smith.

At some point, business decisions described by the court as "bad" must be scrutinized and considered as evidence of a pretextual motive for the action in question and not just bad or poor business decisions. To merely describe any questioned activity as "poor or bad business decisions" simply provides an employer with a discriminatory motive cover for its elicit conduct. Here, the courts below totally ignored the credible testimony of Chairman Smith and gave their heart and sole to the unsworn testimony of the thief, Evans, who stole Allen's petition. To do so, Allen respectfully suggests that the logic of the lower courts is at issue. The balance of the courts' opinions are thereby compromised by this fatal error.

Allen circulated the petition in the period between her first termination and rehiring. If the petition was so disruptive, why did the Board rehire her? The Board in effect terminated Allen for something she did prior to the second hiring. A court opinion dealing with the life of an employee of 17½ years should address these crucial

issues.

Because of the courts' failure to even discuss Chairman Smith's resignation in protest, their conclusions are fatally flawed and the logic in reaching their decisions is at issue.

The Court's review is warranted for all of these reasons.

I. Review Is Warranted Because the Logic of the Panel and Circuit Court Decisions Is Erroneous

Allen appealed from the Order of the District Court granting summary judgment to Respondents, City of Pocahontas, Arkansas, Pocahontas Housing Authority, James Black, Mike Dunn, Max Oakley, Hite Tiner, S. L. Tyer, and Carolyn Loggains, on all portions of her employment discrimination complaint. The panel affirmed. Specifically, the lower court decision which the panel affirmed granted summary judgment based on an unverified statement, inadmissible as evidence or for consideration pursuant to Rule 56 of the Federal Rules of Civil Procedure. Further, the panel affirmed the lower court's finding that Allen lacked a property interest in her employment and therefore was not entitled to due process although employed with the Housing Authority for 17½ years. Third, the panel failed to consider Allen's rehiring as merely a sham so that procedural errors could be corrected in her obviously acknowledged procedurally defective first termination. Fourth, although the panel held, "Allen arguably satisfied her burden of presenting

prima facie evidence of discrimination by demonstrating that she was replaced by an employee who was younger than she was and male," they failed to consider the issue in light of recent decisions, *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148 (2003); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and *Madison v. IBP, Inc.*, 2003 WL 21295082, at *4 (8th Cir. 2003).

Allen respectfully submits that the panel decision is contrary to both United States Court of Appeals For the Eighth Circuit precedent and decisions of this Court. See *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148 (2003); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Madison v. IBP, Inc.*, 2003 WL 21295082, at *4 (8th Cir. 2003); Rule 56(e) of the Federal Rules of Civil Procedure and *Roche v. John Handcock Mutual Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996) (motion must be determined on the record as it exists, and not on the parties' version of what the facts might some day reveal.) But cf. *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1555 (10th Cir. 1995) following majority rule that Rule 56 precludes use of inadmissible hearsay testimony in depositions submitted to support or oppose summary judgment). For a discussion of the at-will doctrine and the separation of powers provisioned in the Arkansas Constitution see *Rogerson v. Hot Springs Advertising and Promotion Comm'n*, 237 F.3d 929, 930 (8th Cir. 2001), which relied on an earlier case, *Ball v. Ark. Dept. of Community Punishment*, 340 Ark. 424, 429-30, 10 S.W.3d 873, 876 (2000), which noted the rationale of *Anastasoff v. United States*, 223 F.3d 898, *vacated on reh'g en banc*, 235 F.3d 1054, 2000 WL 1863092 (8th Cir. 2000).

Allen was discharged without a pretermination hearing, in violation of her Fourteenth Amendment "property interest" in her job, and was denied constitutional due process when she was discharged. Allen was discharged in violation of Ark. Code Ann. § 5-53-112, which makes retaliation against witnesses, informants or jurors a Class A misdemeanor. Her discharge was, thus, in violation of a public policy. Allen further contends that her discharge was in violation of 42 U.S.C. § 1983 because her discharge was by persons acting under color of state law.

Allen's second discharge by S. L. Tyer, upheld by the Pocahontas Housing Authority Board of Commissioners, was arbitrary and without just cause for her exercising her constitutional right of free speech and freedom of political expression, without regard for the due process and equal protection clauses of the First and Fourteenth Amendments, and, in part, retaliation for her solicitation of signatures from tenants for the petition which she circulated within the Housing Authority while she had been terminated.

Chairman of the Board, Elwood Smith, stated that Allen's so-called rehiring was a sham. She had already been deprived of the privileges of her job without a hearing without any procedural due process. The Board of Commissioners were not neutral fact finders, and their second discharge of her was merely a reaffirmation of the first discharge by Carolyn Loggains, compounding the error. Smith resigned his position in protest.

In depriving Allen of a property right in her job and a liberty interest in her reputation, in violation of

procedural due process, all Respondents in their official capacities and as individuals, proximately violated her federally protected rights creating liability to her in constitutional tort.

The lower courts considered facts or material not admissible or usable at trial while completely disregarding evidence in the form of sworn testimony.

Allen originally named the City of Pocahontas, Arkansas as a defendant which the lower court dismissed. She does not appeal the issue of the dismissal of the City of Pocahontas.

The lower court gave precedent to an unsworn statement of Kenneth Clark Evans, the tenant who stole Allen's petition, as opposed to the sworn testimony of Elwood Smith, Chairman of the Housing Authority Board of Commission, who resigned his position in protest of her discharge. Smith testified that Allen's rehiring was merely a sham to correct her procedurally deficient previous termination. It is difficult for one to rationalize the weight given to the unsworn testimony of Evans as opposed to the sworn deposition of Smith. See *Roche v. John Handcock Mutual Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996) (motion must be determined on the record as it exists, and not on the parties' version of what the facts might some day reveal.) and cf. *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1555 (10th Cir. 1995) following majority rule that Rule 56 precludes use of inadmissible hearsay testimony in depositions submitted to support or oppose summary judgment).

The courts totally ignored the effect that Allen's termination had on "promoting an efficient workplace" with the resignation of Elwood Smith, Chairman of the Housing Authority Board of Commission.

Kenneth Clark Evans was just a thief who stole Allen's petition. To give any credence to his actions, and cite as a basis for the decision, belies the weaknesses and errors complained.

Due Process And Property Interest Fourteenth Amendment

In terminating a public employee, the public employer must keep in mind that some courts have held that a public employee has a Fourteenth Amendment "property interest" in his/her job and therefore is entitled to constitutional due process when he/she is discharged. The usual situations in which a "property interest" is found are (i) where the employee handbook is deemed to create a property right. *Whitfield v. Finn*, 731 F.2d 1506 (11th Cir. 1984); and (ii) where there is a mutually explicit understanding between the public employer and employee or an unwritten common law practice in the work place such as where there is an explicit understanding that the employee's position was permanent and the employee has held the position for several years, *McLaurin v. Fischer*, 768 F.2d 98 (6th Cir. 1985). See also *Pearson v. City of Paris*, 839 F.Supp. 645 (W.D. Ark. 1993). The *Pearson* court, citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), stated:

> To have a property interest in employment a person must have a legitimate claim of entitlement to employment. . .
>
> When such a property interest exists, the employee is entitled to a hearing or some related form of due process prior to termination. *Blankenbaker v. McCook Public Power Dist.*, 940 F.2d 384, 385 (8th Cir. 1991), citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). Specifically, the employee has a right to be given an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976).

Allen thus had a property interest in her employment because the employee handbook provided for a pretermination hearing. The fact that Allen was denied the pretermination hearing prior to her first termination, and was rehired because of this, only corroborates the right of the pretermination hearing which was denied prior to her second termination. Thus, Allen was not only denied due process of the pretermination hearing, but was denied the right to claim a property interest in her employment. Certiorari should be granted to clarify the relationship between due process, a property interest in employment, and the length of service or time of employment.

Here, Allen had 17½ years of employment with the Housing Authority and was obviously a permanent

employee.

Again, reference is made to the Chairman of the Board, Elwood Smith, who stated under oath that Allen was only rehired to correct procedural deficiencies in her first termination. If the rehiring was merely a sham so that Allen could be discharged a second time, the question of the Board's credibility is raised concerning their second termination of her as well as the first. Petitioner merely requests this Court to render a decision pursuant to the law upon which she had relied.

At-Will Doctrine, Public Policy And The Arkansas Constitution

The records show that Kenneth Clark Evans has been convicted of harassment in the City of Pocahontas. In the City of Walnut Ridge, Evans has been convicted of battery in the 3rd degree and disorderly conduct twice. Records reflect that numerous charges were nolle prossed or dismissed. The credibility of the Housing Authority's reasons for Allen's discharge is put into issue because of the origin of the Housing Authority's claims. Based on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), the false allegations of the Housing Authority are to be considered by the jury as evidence of not only the lack of substantiation for its claims, but also as evidence of a discriminatory animus.

The public policy of the State of Arkansas is found in its constitution and statutes. Ark. Code. Ann. § 5-53-112, which makes retaliation against witnesses, informants or jurors a class A misdemeanor, illustrates that there is public policy favoring citizen informants.

This public policy is contravened when an employer discharges an employee for reporting a violation of state or federal law. Petitioner contends that she was discharged for agreeing to testify against Loggains concerning Loggains fraudulently charging a tenant for repairs. Allen was reinstated and then discharged a second time by the Board for having passed a petition while she was in limbo between the first discharge and being rehired. In reading *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (1984) and *Sterling Drug, Inc., supra*, which is still good law, it is clear that to retaliate against one for exercising his statutory rights would be against public policy.

The Eighth Circuit Court of Appeals in *Lucas, supra*, held:

> Title VII does not exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any state or political subdivision of a state, other than any such law which purports to require or permit the doing of an act which would be an unlawful employment practice under Title VII. Civil Rights Act of 1964, §708, 42 U.S.C.A. §2000e-7.
>
> We might well agree with Ms. Counce if there was any indication that she was discharged for exercising a statutory right, or for performing a duty required of her by law, or that the reason for the discharge was in violation of some other

> well established public policy. 268 Ark. at 273, 596 S.W.2d at 683. See also *Scholtes v. Signal Delivery Service, Inc.*, 458 F.Supp. 487, 493-94 (W.D.Ark. 1982); Comment, *Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas*, 34 Ark. L.Rev. 729, 730 (1981).
>
> Public policy is usually defined by the political branches of government. Something "against public policy" is something that the Legislature has forbidden.

An Arkansas case, *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), cited *Lucas, supra*, in determining that a public policy discharge action is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for an act done in the public interest, a contract cause of action is most appropriate.

The lower court based its finding that Allen was an employee at-will on *Rogerson v. Hot Springs Advertising and Promotion Comm'n*, 237 F.3d 929, 930 (8th Cir. 2001), which relied on an earlier case, *Ball v. Ark. Dept. of Community Punishment*, 340 Ark. 424, 429-30, 10 S.W.3d 873, 876 (2000). *Ball* acknowledges an exception to the at-will doctrine where an employee relies upon a personnel manual that contains an express agreement against termination for cause. *Gladden*, 292 Ark. at 136, 728 S.W.2d 501. Allen has established that she is not an at-will employee because of her procedural rights of due

process set out in the Housing Authority's employee manual, clearly acknowledged by the Housing Authority's rehiring and subsequent termination after notice and a hearing. *See* statement of Board Chairman Elwood Smith referred to earlier.

Ball also discussed the at-will exception for discharge if an employee is discharged in violation of a well-established public policy of the state. The public policy of a state is found in its constitution and statutes, *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991).

In a footnote, the *Ball* court noted the rationale of *Anastasoff v. United States*, 223 F.3d 898, *vacated on reh'g en banc*, 235 F.3d 1054, 2000 WL 1863092 (8th Cir. 2000), but did not apply because the issue of whether Rule 5-2 violates the Arkansas Constitution, see Ark. Const. of 1874, art. IV § 2 (separation-of-powers provision), was not briefed. Allen herein does raise this issue, that the lower court's decision is unconstitutional in that it rests on an interpretation of the "judicial power of the United States," whose limits are set by Article III of the United States Constitution. See *Anastasoff, supra.* At this point, the lower court should not have been concerned with comity as its ruling was the initial determination of the issues.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-1990

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Judy Allen,
Plaintiff/Appellant,

v.

City of Pocahontas, Arkansas; Pocahontas Housing Authority; James Black, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Mike Dunn, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Max Oakley, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Hite Tiner, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; S.L. Tyer, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners; Carolyn Loggains,
Defendants/Appellees.

November 8, 2002, Submitted
August 15, 2003, Filed

COUNSEL: For Judy Allen, Plaintiff - Appellant: Larry Joe Steele, Walnut Ridge, AR.

For City of Pocahontas, Arkansas, Defendant - Appellee: John C. Throesch, Pocahontas, AR.

For Pocahontas Housing Authority, S.L. TYER, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners, Defendants - Appellees: Matthew Keith Wren, HART & WREN, Little Rock, AR.

For JAMES BLACK, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners, MIKE DUNN, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners, MAX OAKLEY, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners, HITE TINER, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners, Defendants - Appellees: V. James King, Jr., RIFFEL & KING, Pocahontas, AR. Matthew Keith Wren, HART & WREN, Little Rock, AR.

For CAROLYN LOGGAINS, individually and in his official capacity as a member of Pocahontas Housing Authority Board of Commissioners, Defendant - Appellee: V. James King, Jr., RIFFEL & KING, Pocahontas, AR.

JUDGES: Before McMILLIAN, MELLOY, Circuit Judges, and FRANK, n1 District Judge.

OPINIONBY: FRANK

OPINION: FRANK, District Judge.

Appellant Judy Allen appeals the District Court's n2 order granting summary judgment to Pocahontas Housing Authority, James Black, Mike Dunn, Max Oakley, Hite Tiner, S.L. Tyer, and Carolyn Loggains. n3 For the reasons set forth below, we affirm.

I. Background

Appellant Judy Allen ("Allen") began working as a maintenance person for the Pocahontas Housing Authority in March of 1980.

Carolyn Loggains ("Loggains"), another employee of the Pocahontas Housing Authority (the "Housing Authority"), was promoted to executive director of that organization in or around 1991. Although Loggains and Allen had previously enjoyed an amicable relationship, their relationship soured after Loggains's promotion. In or around 1993 or 1994, Allen was subpoenaed to testify against Loggains in a lawsuit involving allegations of fraud and wrongful eviction of a Housing Authority tenant. In the wake of that incident, the relationship between Allen and Loggains deteriorated even farther. By February of 1997, Loggains and Allen were speaking to one another only when absolutely necessary.

On or about February 5, 1997, Loggains terminated Allen.

On March 7, 1997, Allen received a letter, dated March 5, from the Housing Authority Board of Commissioners ("the Board") stating that, although the Board believed the termination was appropriate, they were reinstating Allen with back pay and benefits because they believed

that the personnel policies governing the termination were outdated and in need of revision. The letter further advised Allen to report to work on March 12, 1997.

On March 11, 1997, Allen circulated a petition among the Housing Authority tenants. The petition stated: "We the tenants of the Pocahontas Housing Authority, without prejudice or a biased opinion, feel the Executive Director (Carolyn Loggains) of the Housing Authority, does, with malice, treat the tenants with a disrespectful and demeaning attitude."

One of the tenants, Clark Evans, attempted to take the petition to the Housing Authority office, but asserted that Allen stopped him. Evans called the police. According to the police report, Evans complained that Allen "keeps comming [sic] by his apt. trying to get him to sign a petition to get his landlord fired. States that Allen has threatened him (Evans) with eviction if he didn't sign. Complainant stated Mrs. Allen was fired from housing project about 2 weeks ago."

On March 12, 1997, the day she was to return to work, Allen called in sick. She continued to call in sick until March 24, 1997.

On March 25, 1997, the Housing Authority gave Allen a copy of its revised personnel policy, and Allen signed a statement indicating that she had received, read, understood, and agreed to the revised policy.

On March 26, 1997, Loggains sent Allen a letter accusing her of making obscene gestures and mouthing an obscenity, both directed at Loggains. Allen

requested and was afforded a grievance hearing regarding the letter. Following the grievance hearing on April 4, 1997, the Housing Authority informed Allen that the March 26, 1997, letter would be placed in Allen's personnel file.

On or about April 25, 1997, Loggains resigned from the Housing Authority.

On April 28, 1997, Clark Evans again contacted the police about Allen. According to the police report, Evans complained that Allenhad been harrassing [sic] him. He said that Allen who works at Manor Apts is mad at him because he took a petition from her and gave it to the management. Mr. Evans said that Allen has swerved at him w/her vehicle and keeps harrassing [sic] him. Evans states it has been ongoing.

On May 21, 1997, S.L. Tyer, Acting Executive Director of the Housing Authority, notified Allen that she was being terminated for insubordination and tenant complaints. Allen requested and received a grievance hearing regarding her termination.

Allen brought suit on February 1, 1999, alleging violations of her First Amendment right to free speech, her Fourteenth Amendment right to due process, 42 U.S.C. §§ 1983 and 1985, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Civil Rights Act of 1991, and Title VII (gender discrimination).

II. Discussion

A. Standard of Review

We review de novo a grant of summary judgment, applying the same standard as the district court and viewing the record in the light most favorable to the nonmoving party. Barrera v. Con Agra, Inc., 244 F.3d 663, 665 (8th Cir. 2001). Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Due Process

Allen asserts that she had a property interest in her position with the Housing Authority and was thus entitled to procedural due process prior to termination. She further alleges that the termination implicated a constitutionally protected liberty interest.

Whether an employee's interest in her job rises to the level of a constitutionally protected property right is a question of state law. See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Arkansas law recognizes two exceptions to the at-will employment doctrine: (1) where a personnel manual specifies that termination will only be for cause and (2) where the employment agreement itself specifies that termination will only be for cause. See Rogerson v. Hot Springs Advertising and Promotion Comm'n, 237 F.3d 929, 930 (8th Cir. 2001); Gladden v. Ark. Children's Hosp., 292 Ark. 130, 728 S.W.2d 501, 505 (Ark. 1987).

Allen suggests that the practice and procedures in place at the time of Allen's first termination-which is not a part of the record before the Court, except as described in the testimony of former Board chairman Elwood Smith-specified that employees were entitled to certain pre-termination notice and procedures. While that might have been true at the time of Allen's initial termination, the employee manual in place at the time of her second termination provided only for a post-termination grievance procedure, which is insufficient to create a constitutionally protected property interest. See Skeets v. Johnson, 816 F.2d 1213, 1215 (8th Cir. 1987).

Moreover, the only evidence in the record that the "policy" in place at the time of the first termination provided for any sort of pre-termination process is the testimony of former Board Chair Elwood Smith that "you can't fire an employee until you have 20 days notice or something to that effect." (Joint Appendix at 105.) Grievance procedures that do not establish any grounds upon which termination must be based do not in themselves create a property interest in employment." Hogue v. Clinton, 791 F.2d 1318, 1324 (8th Cir. 1986) (citations omitted). Indeed, where the procedures "place no significant substantive restrictions on the decision-making," the procedures themselves will not create a property interest in the employment. Id.

Allen urges the Court to recognize another exception to the at-will employment doctrine, one for terminations in violation of public policy. Specifically, Allen asserts that she was terminated because she testified against Loggains in 1993 or 1994 and that, as a result, her termination violated Arkansas law. Again, the Court

need not address the outstanding legal question of whether the public policy exception to Arkansas's at-will employment doctrine creates a "property interest" that is protected by the Fourteenth Amendment's guarantee of due process. Here, the record contains absolutely no evidence that Allen was terminated because of her 1994 testimony against Loggains. The mere fact of protected conduct is not sufficient to give rise to an inference of causation, and the extraordinary length of time between the testimony and Allen's termination would belie any attempt to infer causation. Moreover, Allen's second termination came after Loggains herself had left the Housing Authority, and there is no evidence that any of the decision-makers involved in the second termination were even aware of Allen's prior testimony.

The Court turns next to Allen's assertion that she was deprived of a liberty interest without due process. "An employee's liberty interest is implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges." Shands v. City of Kennett, 993 F.2d 1337, 1347 (8th Cir. 1993). In addition to demonstrating that the proffered reasons for discharge were stigmatizing, an employee asserting violation of a liberty interest must further show that his employer made those reasons public. See Payne v. Ballard, 761 F.2d 491, 493 (8th Cir. 1985).

This Court agrees with the conclusion reached by the District Court. First, the proffered reasons for Allen's termination-insubordination and tenant complaints-are not so sufficiently stigmatizing as to implicate a liberty interest. Second, even if the charges were sufficiently

damaging as to implicate a liberty interest, there is no evidence in the record to indicate that any of the Defendants made the reasons for Allen's termination public.

Because the Court concludes that Allen's termination implicates neither a constitutionally protected property interest nor a constitutionally protected liberty interest, Allen's claims under the Fourteenth Amendment were appropriately dismissed.

C. First Amendment

Allen asserts that she was terminated, at least in part, because she circulated a petition among tenants on the issue of Loggains's competence. She asserts, as a result, that her termination violated her First Amendment right to free speech.

As this Court stated in Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000):Whether the First Amendment shields a public employee from discharge as a result of her speech requires a two-step judicial inquiry. See Shands v. City of Kennett, 993 F.2d 1337, 1341 (8th Cir. 1993). First, we determine whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); Shands, 993 F.2d at 1342. Second, if the speech addresses a matter of public concern, we balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563,

568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); Shands, 993 F.2d at 1342. Both inquiries are questions of law for the court to decide. See Connick, 461 U.S. at 148 n.7, 150 n. 10, 103 S. Ct. 1684; Shands, 993 F.2d at 1342.Applying this analysis, known as the " Connick- Pickering analysis," to the instant case, the Court finds that the District Court properly granted summary judgment in favor of the Defendants on Allen's First Amendment claim.

First, the Court finds that, as a matter of law, the petition Allen circulated was not "on a matter of public concern." The petition states that Loggains was disrespectful and demeaning to the tenants, but it does not suggest that she was derelict in her duty or engaging in malfeasance, merely that her demeanor was unpleasant. Such a statement hardly implicates "a matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. at 146.

Moreover, Allen herself attempts to argue that the petition was a matter of public concern because she "had every right to build her case to present to the Board for her reinstatement." Appellant's Brief at 43. Even where the content of the speech is arguably a matter of public concern, "unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment." Buazard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999).

Second, even if the Court were to accept Allen's contention that the petition was a matter of public concern, the second prong of the Connick- Pickering analysis would nevertheless dictate dismissal of her

First Amendment claims. In balancing Allen's interest in the speech with the Defendants' interests in promoting the efficiency of the public services performed through its employees, the Court should consider, inter alia, the time, place, and manner of the speech, and whether the speech interfered with Allen's ability to perform her duties. See Belk v. City of Eldon, 228 F.3d at 880. Given that Allen's "speech" resulted in two complaints to the local police department and a dispute between Allen and Don Walker, a co-worker, and in light of the limited public interest in Allen's concerns, the Court must conclude that the balance of interests clearly weighs in favor of the Defendants' interests in promoting an efficient workplace.

Accordingly, the Court concurs with the District Court's conclusion that Allen's First Amendment claim cannot stand.

D. Age and Gender Discrimination

Allen has alleged age discrimination in violation of the ADEA and § 1983. She has further alleged gender discrimination in violation of Title VII and § 1983.

As the District Court noted, the record indicates that the Pocahontas Housing Authority has never employed the threshold number employees necessary to invoke the ADEA (twenty employees) or Title VII (fifteen employees). Although Allen argued in the court below that Pocahontas Housing Authority should be considered part of the City of Pocahontas for purposes of calculating the size of the workforce, Allen has not renewed that argument on appeal. Thus, the question presented on appeal is whether Allen has created

genuine issues of material fact sufficient to proceed with claims of gender and age discrimination brought pursuant to § 1983.

Allen's claims of age and gender discrimination, whether sounding under the ADEA, Title VII, or § 1983, n4 all require the Court to engage in the familiar McDonnell Douglas burden shifting analysis. n5 Pursuant to that analysis, the claimant must first proffer a prima facie case of discrimination; the burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action; and then the burden shifts back to the employee to show that the proffered reason is merely a pretext for discrimination. See Cronquist v. City of Minneapolis, 237 F.3d 920, 923 (8th Cir. 2001).

Allen arguably satisfied her burden of presenting prima facie evidence of discrimination by demonstrating that she was replaced by an employee who was younger than she was and male.

Defendants, however, offered a legitimate, non-discriminatory reason for terminating Allen: insubordination and tenant complaints. n6

As the District Court noted, Allen offered no evidence whatsoever to indicate that these legitimate non-discriminatory reasons were merely pretextual. Indeed, Allen herself asserted that she did not think she was terminated for her age. When asked whether she was terminated because of her gender, she stated 'probably," "I really don't know," and "I can't say for sure." Beyond these equivocal and unsupported assertions by Allen, there is no indication in the record

at all that Allen's age or gender played any role in the Board's decision to terminate her.

E. Fair Labor Standards Act

As noted by the Court below, the Fair Labor Standards Act is cited in Allen's Complaint, but she did not address the issue in the motion for summary judgment below, nor has she addressed it on appeal. Accordingly, the Court concurs with the District Court that summary judgment in favor of the Defendants was appropriate on that claim.

III. Conclusion

In accordance with the foregoing, we affirm the District Court's judgment in favor of Defendants.

FOOTNOTES

n1 The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota, sitting by designation.

n2 The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

n3 The District Court's order dismissing Allen's claims against the City of Pocahontas, Arkansas, has not been appealed.

n4 As the District Court noted, there is some question whether an age discrimination claim can be brought pursuant to § 1983 or whether all such claims must be

brought pursuant to the ADEA. This is not the case in which to resolve that issue.

n5 On August 4, 2003, Appellant submitted a Motion to Supplement Appellant's Brief and Addendum discussing the United States Supreme Court's decision in Desert Palace, Inc. v. Costa, 156 L. Ed. 2d 84, 123 S. Ct. 2148 (June 9, 2003). The Court grants that motion. Without reaching the issue as to whether the Supreme Court's refocus on the statutory language of the Civil Rights Act of 1991 alters the burden-shifting analysis of McDonnell Douglas, the result in this case remains the same. Here, Petitioner has provided no evidence, direct or circumstantial, from which a reasonable jury could logically infer that age or gender was a motivating factor in her termination. See Desert Palace, 123 S. Ct. at 2155, citing 42 U.S.C. § 2000e-2(m).

n6 Allen makes much of the fact that the tenant who complained, Evans, had a criminal history and was not trustworthy. The Court need not determine that Evans truthfully reported his encounters with Allen to the police; it is sufficient that the police reports were available to members of the Board, that they are, on their face, tenant complaints, and that there is no evidence that the Board knew or had reason to believe that the reports were false. This Court has repeatedly held that it is not a "super-personnel department" and that it is not unlawful for a company to make employment decisions based upon erroneous information and evaluations. See Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 957 (8th Cir. 2001).

No. 02-1990

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Judy Allen,
Appellant,

v.

City of Pocahontas, Arkansas, et al,
Appellees.

September 17, 2003, Decided

OPINION:

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 17, 2003

No. 3:99CV00038 GH

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JUDY ALLEN,
Plaintiff

v.

CITY OF POCAHONTAS, ARKANSAS, ET AL.,
Defendants.

ORDER

FILED MARCH 19, 2001

Pending before the Court is defendants' motion for summary judgment to which plaintiff has responded and defendants have filed a reply. Also pending before the Court are defendants' motion for leave to file a second motion for summary judgment on the issue of qualified immunity and the motion itself. Plaintiff has filed an objection/response to those motions.

Plaintiff filed her complaint on February 1, 1999, alleging violations of her rights under the First and Fourteenth Amendments to free speech and due process, 42 U.S.C. § § 1983 and 1985, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Civil Rights Act of 1991 and Title VII due to her sex in the events surrounding her discharge from employment, subsequent reinstatement, second discharge, and post-termination proceedings. She filed

an amended complaint of February 16, 1999, that terminated the federal defendants and corrected a defendant's name.

Summary judgment can properly be entered when there are no genuine material facts that can be resolved by a finder of fact; that is, there are no facts which could reasonably be resolved in favor of either party. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby. Inc., 106 S. Ct. 2505, 2512 (1986). The non-moving party may not just rest upon his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986); Civil Procedure Rule 56. "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law." Holloway v. Pigman, 884 F.2d 365, 366 (8th Cir. 1989).

Local Rule 56.1 provides that a party moving for summary judgment must file a separate, short and concise statement of material facts as to which it contends there is no genuine issue to be tried. The rule further provides that unless the non-moving party files a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried, all material facts set forth in the moving party's statement will be deemed admitted.

In her June 19th statement of facts in dispute, plaintiff challenges three of the "facts" in defendant's statement that "[d]efendants are attempting to bootstrap false

information with statements made but factually incorrect. Just because the statement is made does not make the statement true." The following recitation contains the facts that have not been disputed along with the comments by plaintiff as to the three that she does contest in brackets:

1. Judy Allen, Plaintiff, was first hired by the Pocahontas Housing Authority in March of 1980 to work as a maintenance person.

2. Around 1991, Defendant Carolyn Loggains was promoted to the position of executive director of the Pocahontas Housing Authority.

3. Prior to Ms. Loggains becoming executive director, she and Plaintiff were good friends.

4. The relationship between Plaintiff and Ms. Loggains began to change when Plaintiff was subpoenaed to court to testify in a lawsuit concerning the eviction of a tenant of the housing authority.

5. The relationship between Plaintiff and Ms. Loggains began to further deteriorate after some comments were made by Plaintiff to another employee. According to Plaintiff, Ms. Loggains "called me in to gripe me over the story."

6. In the months preceding February 5, 1997, Plaintiff and Carolyn Loggains were not getting along. Plaintiff states that "we wasn't talking unless we totally had to."

7. Plaintiff agreed that this was a bad situation to have between the executive director and one of the employees.

8. Morale was low among the employees at the Pocahontas Housing Authority and Plaintiff believes that Ms. Loggains probably told her that Plaintiff was the cause of the low morale.

9. On or about February 5, 1997, Plaintiff was terminated by Carolyn Loggains.

10. Plaintiff testified that she does not know why Ms. Loggains fired her on February 5, 1997.

11. On March 7, 1997, Plaintiff received a letter from the Pocahontas Housing Authority Board of Commissioners advising her that although the Board believed that the action taken by Ms. Loggains was appropriate, Plaintiff was being reinstated with full back-pay and benefits because the personnel policies governing the termination were outdated and in need of revision.

12. According to the letter to Plaintiff, Plaintiff was to report to work at 8:00 a.m. on March 12, 1997 and was to report for work assignments directly to Ms. Loggains since Plaintiff's former immediate supervisor was also her husband.

13. On or about March 11, 1997 Plaintiff took a petition around to the tenants of the Pocahontas Housing Authority to sign. The petition stated;

> We the tenants of the Pocahontas Housing Authority, without prejudice or a biased opinion, feel the Executive Director (Carolyn Loggains) of the Housing Authority, does, with malice, treat the tenants with a disrespectful and demeaning attitude.

14. One of the tenants, Clark Evans, took the petition from Plaintiff and took it to the office of the housing authority. Plaintiff followed him there and told him to give it back to her and that he was in trouble. Mr. Evans called the police and stated to the police

> Judy Allen keeps comming [sic] by his appt. trying to get him to sign a petition to get his landlord fired. States that Allen has threatened him (Evans) with eviction if he didn't sign. Complainant stated Mrs. Allen was fired from housing project about 2 weeks ago.

[is technically correct but incorrectly states the facts and should be put in proper context. Plaintiff denies that she threatened Evans with eviction. The fact is that Evans' credibility is seriously questioned. (See Evans' Municipal Court records for the City of Walnut Ridge and City of Pocahontas attached to her response.)]

15. Instead of returning to work on March 12, 1997 as had been instructed in the March 5, 1997 letter from the Pocahontas Housing Authority Board of Commissioners, Plaintiff called in sick.

16. Plaintiff called in sick until March 24, 1997.

17. On March 25, 1997, Plaintiff was given a copy of the revised personnel policy of the Pocahontas Housing Authority. Plaintiff signed a statement indicating that she had received, read, understood and agreed to the policy.

18. The personnel policy of the Pocahontas Housing Authority does not contain a provision that an employee may only be terminated for cause or that the employee's term of employment is for a specific period of time.

19. On March 26, 1997, Carolyn Loggains sent a letter to Plaintiff accusing Plaintiff of making obscene gestures towards her and silently mouthing "bitch," and warning Plaintiff that she could be terminated for this behavior. The letter also advised Plaintiff that she may request a grievance hearing within ten days of the date of the letter. [Plaintiff specifically denies the first sentence and mouthing the word "bitch" and making obscene gestures.]

20. Plaintiff attended a grievance hearing on or about April 4,1997, following which she was told that the letter would remain in her personnel file.

21. On or about April 25, 1997, Carolyn Loggains resigned as the Executive Director of the Pocahontas Housing Authority.

22. On April 29, 1997, Clark Evans again went to the police and complained that

> Judy Allen had been harrassing [sic] him. He said that Allen who works at Manor Apts is

> mad at him because he took a petition from her and gave it to the management. Mr. Evans said that Allen had swerved at him w/ her vehicle and keeps harassing [sic] him. Evans states it has been ongoing.

[is technically correct but factually wrong and denied. Plaintiff denies harassing Evans and swerving at him with her vehicle. When Evans' background is examined, the conviction for harassment, etc., the credibility of the Housing Authority's position is dramatically weakened.]

23. On May 21, 1997, Plaintiff was informed by S.L. Tyer, Acting Executive Director, that she was being terminated for the primary reason of insubordination and tenant complaints. The letter also advises Plaintiff that she may have a grievance hearing regarding her termination.

24. Following receipt of the letter on May 21, 1997, Plaintiff requested and received a grievance hearing.

25. Plaintiff stated that she does not know why she was fired on May 21, 1997, but she believes that "it was part of what Carolyn had done, trying to get rid of me legal."

26. Plaintiff testified that she did not know Defendants James Black, Max Oakley and Hite Tyner. She further testified that she did not have any run-ins or problems with S.L. Tyer.

27. In 1997 there were six employees of the Pocahontas Housing Authority and about the same

number on 1996. The maximum number of employees at the Pocahontas Housing Authority was eight.

28. Following her termination, there was no newspaper or television coverage of her termination and no one ever told Plaintiff that they had been told the reason for her termination.

On May 26, 2000, defendants fled a motion for summary judgment supported by brief, exhibits and a separate statement of undisputed facts on the grounds that plaintiff did not have a property interest in her employment, that her liberty interests were not violated, that neither Title VII nor the ADEA are applicable to the Pocahontas Housing Authority ("PHA"), and that she has no evidence that her First Amendment rights were violated as a result of her termination. They state that plaintiff's property interest entitling her to due process is determined by state law and Arkansas still has an "at-will" employment doctrine that permit discharge by an employer for good cause, no cause, or even a morally wrong cause. The only exceptions to the at-will doctrine are if there is an agreement as to the duration of employment or there is a statement in the employment agreement or handbook that state that termination will only be for cause. Defendants excerpt the personnel policy in effect on May 21, 1997 when plaintiff was terminated as not providing that she could only be terminated for cause or that her employment was for a specific term. While plaintiff was entitled to a post-termination grievance procedure which she received, defendants contend that this only creates an expectancy of review - not continued employment - and the Eighth Circuit has so held.

Turning to liberty interests, defendants assert that plaintiff must show a stigmatizing reason given for the discharge which touches on her good name, reputation, honor or integrity that would tend to make it difficult for her to gain future employment and that defendants made the reasons public. They maintain that the only reasons given for plaintiff's termination were insubordination and tenant complaints which do not meet the first prong set out above. Defendants continue that plaintiff testified that there was no newspaper or television coverage of her termination and no one ever told her that they had been told the reason for her termination so she cannot prove the second element of a liberty interest claim as well.

Defendants contend that PHA is not an employer for purposes of Title VII or the ADEA since plaintiff testified that the maximum number of employees was eight. They state that fifteen or more employees are required under Title VII and twenty or more are required under the ADEA before an entity can be considered as an "employer" covered under those acts.

Finally, defendants argue that plaintiff has not presented any credible evidence that her First Amendment rights were violated because of her termination since she testified that she did not know why she was terminated on May 21, 1997, but thought "it was part of what Carolyn had done, trying to get rid of me legal." They relate that plaintiff stated that she did not know any of the individual defendants or had any problems with them and that the executive director with whom she had had conflicts had resigned on April 25, 1997, approximately one month before the acting

executive director terminated her employment for a second time.

Plaintiff responded on June 19th by summarizing testimony from the depositions of plaintiff and Elwood Smith, who was Chairman of the PHA Board of Commissioners until he resigned during the spring of 1997. After setting out the standards for summary judgment, plaintiff outlines the McDonnell-Douglas model to be applied to discrimination claims along with the recent decision of Reeves v. Sanderson Plumbing Products. Inc., 120 S. Ct. 2097 (2000) clarifying the burden of proof. As to pretext, plaintiff states that she has offered evidence in her summary of Loggains' change of attitude toward plaintiff with plaintiff's subpoena to testify against Loggains and that plaintiff was prepared to testify that Loggains was charging a tenant for a new doorknob when an old doorknob was used. She contends that the poor attitude of Loggains escalated with her discharge by Loggains without following procedure or affording plaintiff due process and that after consultation with HUD, the board rehired plaintiff which was a sham so that the board could follow procedure and present a sham due process proceeding.

Turning to the at-will doctrine, plaintiff asserts that Arkansas has adopted a cause of action for wrongful discharge when an at-will employee is discharged in violation of public policy such as retaliation against witnesses. She contends that she was discharged for agreeing to testify against Loggains concerning Loggains fraudulently charging a tenant for a new doorknob and was reinstated and then discharged a second time for having passed a petition while she was

in limbo between the first discharge and being rehired. Plaintiff argues that §1983 liability is found since she was discharged once by Loggains, her discharge was reviewed by the board, and then she was discharged a second time by board member Tyer. She contends that Smith's testimony and the court records of the PHA's main witness Clark present fact questions' for the jury to decide whether the stated reasons for plaintiffs discharge were credible or pretextual. Plaintiff also raises the standard for determining when public officials are entitled to individual qualified immunity. In a section discussing the relation of § 1983 and Title VII, plaintiff says that she must prove that the discrimination based on her sex was intentional and that a sexual discriminatory purpose was a motivating factor.

As to her Fourteenth Amendment claim of a property interest, plaintiff, relying on a Sixth Circuit case, maintains that she had 17%years of employment with PHA and was obviously a permanent employee. On her liberty interest claim, she states that one of the reasons given for her second discharge was complaints of tenants, but Smith testified that to his knowledge no tenant had ever complained about plaintiff and the sole witness PHA has produced is Evans whose municipal court records reveal convictions of harassment, battery in the 3r^{d} degree and disorderly conduct along with numerous charges that were dismissed or nolle prossed so that the credibility of the PHA's reasons for plaintiff's discharge is put into issue because of the origin of the PHA's claims. Plaintiff argues that the false allegations of the PHA are to be considered not only as evidence of the lack of substantiation for its claims, but as evidence of a discriminatory animus.

Next, plaintiff asserts her right to voice her opinion on matters of public concern as opposed to matters only of a personal interest. She alleges that part of the reason for her second discharge was the petition she authored after her first discharge and the allegations of insubordination and tenant complaints for the second discharge are merely pretextual as the rehiring was a sham. Plaintiff says that the tenant complaints consist solely of the complaints by Evans and the PHA has not explained what the insubordination claims arise out of. She states that at the time of the petition, she had just been terminated by Loggains and so she had every right to build her case to present to the board for her reinstatement. On the final point as to whether Title VII and the ADEA are applicable to PHA, plaintiff contends that die Court's previous ruling finding that the PHA was not merely a division of the City of Pocahontas and dismissing the City was error and that the total number of employees of the City should be counted.

Defendants filed a reply on July 7th that plaintiff has provided no evidence that PHA has enough employees to be an "employer" for Title VII and ADEA purposes and plaintiff unsuccessfully made the argument that the PHA should be considered part of the City. They state that Arkansas law makes it clear that a housing authority is its own body politic and may sue and be sued in its own name. Defendants assert that plaintiff has not alleged any state law causes of action in either the complaint or first amended complaint although she argues that she suffered a wrongful discharge in violation of state public policy. While pointing out that plaintiff has not sought leave to amend to raise this new claim, they argue futility since plaintiff testified in her

deposition that she does not know why Loggains fired her on February 5, 1997.

Defendants also dispute plaintiff's First Amendment argument in that she does not deny that a tenant of PHA named Evans made complaints to the police about plaintiff on March 11, 1997 and April 28, 1997, but merely states that she denies the veracity of his complaints and supplies copies of Evans criminal record many of which show the charges were dismissed or nolle prossed. Moreover, she does not supply anything to suggest that the defendants were aware of Evans' criminal record or that they should have doubted his complaints. They also point to her stating that she believes her termination on May 21, 1997 was for the same reasons as her February 5, 1997 termination and the second termination was to cure the defects in the first one. Defendants recite that after the February 5, 1997 termination, plaintiff was sent a certified letter for which she signed on March 7, 1997 informing her to report to work on March 12th and on March 11th, plaintiff took a petition around to the PHA tenants. Loggains resigned on April 25, 1997 and plaintiff was again terminated by acting director Tyer on May 21, 1997. When asked in her deposition why she believed she was fired, plaintiff replied that she believed it was for the same reasons she had been terminated on February 5th, but that termination had not been correct procedurally. She has also stated that at her grievance hearing she was accused of distributing the petition. Defendants argue that even assuming that her termination was due in part because of the petition, her First Amendment rights were not violated. They maintain that the petition does not meet the standard for speech of public concern since it simply complains

about Loggains' bad attitude towards tenants, there is no evidence that the petition was brought to the attention of the board except by a tenant who did not wish to sign the petition and so the argument that her conduct was intended as a matter of public concern is an after-the-fact argument made by counsel not supported by plaintiff's own statements. Defendants also contend that plaintiff engaged in that activity purely out of her own self-interest since she decided to embark on this activity to "build her case to present to the board for reinstatement." Finally, defendants state that even if the petition could be considered a matter of public concern, the value of the petition cannot outweigh the damage to plaintiff's work relationship with her employer by a petition directly critical of the executive director to individuals over which the executive director had authority served no purpose but to undermine that authority.

They also filed a motion the same date as the reply for permission to file a belated summary judgment motion raising the issue of qualified immunity. The motion for summary judgment in issue was filed then along with a brief that there is not any substantial evidence that the actions taken by the individual defendants violated plaintiffs First Amendment rights.

On July 12th, plaintiff objected that the motion was untimely and responded to the merits of the motion as well. She contends that her first termination was in violation of the due process and equal protection clauses of the Fourteenth Amendment and the second termination was a sham affirming the illegal acts of the first. Plaintiff continues that she was discharged in violation of her rights to free speech and freedom of

association guaranteed by the First Amendment and the freedom of political expression protected by the Ninth Amendment as well as retaliation for her refusal to commit perjury in a court proceeding, her association with the tenants, and her petition while technically not an employee of PHA. She also suspects that one or more representatives of the PHA was responsible for the malicious attempt to prosecute her for harassment. Plaintiff states that the actions of the individuals clearly violated established statutory and constitutional rights of which a person would have known and evidence of the defendants' knowledge of wrongdoing is the second discharge attempting to correct the illegal acts of the first discharge.

Plaintiff's claims of sex and age discrimination are based on her allegations that when she was terminated on May 21, 1997, she was 56 years old and was replaced by a less qualified male in his 20's. Although it is not clear, it appears from the provisions recited in the amended complaint that she is maintaining these claims under Title VII, the ADEA, § 1983, the Civil Rights Act of 1991, and the Fair Labor Standards Act.fn1 While the Court assumes that the reference to the Civil Rights Act of 1991 is in the context of Title VII, the Court observes that § 1981 of the Act only protects against discrimination based upon race or alienage, in relation to the right to make and enforce contracts only, and that claims of gender or sex discrimination are not cognizable. DeGraffenreid v. General Motors Assembly Div., St. Louis, 558 F.2d 480, 486 n. 2 (8th Cit. 1977). See also, Manning v. Metropolitan Life Ins. Co.. Inc., 127 F.3d 696, 689 (8th Cir. 1997).

Attached to plaintiff's original complaint was a copy of the November 4, 1998 right to sue notice advising that the EEOC was closing its file since the employer employs less than the required number of employees. Plaintiff has admitted that in 1997 there were six employees of the PHA and about the same number on 1996 and that the maximum number of employees at the PHA was eight. She has not contested that Title VII requires at least fifteen employees and the ADEA requires at least twenty employees before an entity is an "employer" governed by these statutes. Her only argument is that the employees of the City of Pocahontas should be included in the number of employees for PHA and that this Court was in error in previously ruling that PHA was a separate entity and dismissing the City. The Court finds that the earlier ruling is still correct. Since it is undisputed that PHA is not an employer covered by Title VII or the ADEA, judgment will be entered in favor of defendants on plaintiff's Title VII claim of sex discrimination and her ADEA claim of age discrimination.fn2

As to plaintiff's claim of sex discrimination in violation of §1983, the Eighth Circuit has applied the Title VII analysis to § 1983 gender-discrimination action. Duffy v. Wolle, 123 F. 3d 1026, 1036-37 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998). However, the Eighth Circuit has never directly addressed whether an equal protection claim for age discrimination is preempted by the ADEA. The circuits that have ruled on this issue have found that such claims are preempted by that federal statute. See, e.g., Zombro v. Baltimore, 868 F.2d 1364 (4th Cit. 1989); Lafleur v. Texas Dep't of Health, 126 F.3d 758 (5th Cit. 1997); Migneault v. Peck, 204 F.3d 1003 (10th Cir. 2000); Holbrook v. City of

Alpharetta, 112 F.3d 1522 (11th Cir. 1997). Moreover, Alone in Its Field: Judicial Trend to Hold that the ADEA Preempts 1983 in Age Discrimination in Employment Claims, 29 Stetson L. Rev. 573, 573-574 (2000) (footnotes omitted) starts out as follows:

> The Supreme Court has stated that "only twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983." Perhaps with this cautionary statement in mind, lower courts have held that statutes with remedial provisions as elaborate as those contained in the Civil Rights Act of 1964 do not provide exclusive remedies, but leave plaintiffs free, in certain circumstances, to bring concurrent claims based on identical facts under § 1983. Despite this seeming reluctance, a trend is developing in the circuit courts of appeals that the Age Discrimination in Employment Act (ADEA) provides the exclusive remedy for claims of age discrimination against employers, and that § 1983 suits are thereby preempted. Every circuit that has considered the question directly has held that the ADEA preempts § 1983 claims for age discrimination in employment. District court decisions, however, fall on both sides of the question. This Article argues that the ADEA clearly preempts age discrimination in employment claims brought under § 1983.

For purposes of this motion, the Court is going to assume, but without deciding, that plaintiff pursue a §

1983 age discrimination claim and so will apply the Title VII analysis to this claim as well.

The below excerpts from Cronquist v. City of Minneapolis, 237 F.3d 920, 923-925 (8th Cir. 2001) outline the analysis:

> First, a plaintiff can proceed under the three-stage, burden-shifting standard set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See also Tex. Dept of Com. Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination, Rothmeier, 85 F.3d at 1332. Once a prima facie case is established, a rebuttable presumption shifts the burden to the employer to articulate a legitimate, nondiscriminatory reason for discharging the employee. Id. If the employer articulates such a reason, the presumption disappears and the plaintiff bears the burden of proving that the employer's proffered reason is merely a pretext for discrimination.
> Id.
>
> ****
>
> To survive summary judgment at the third stage of the McDonnell Douglas analysis, "the rule in [the Eighth] Circuit is that an [employment-discrimination] plaintiff can avoid summary judgment only if the evidence

> considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [a prohibited motive] was a determinative factor in the adverse employment decision." Rothmeier, 85 F.3d at 1336-37.

Proceeding as if plaintiff has made a prima facie case, the Court finds defendants have articulated legitimate, nondiscriminatory reasons of insubordination and tenant complaints for discharging her as an employee. However, the Court finds that plaintiff has totally failed to prove pretext when the burden shifts back to her. The only evidence that sex and/or age were determinative factors in her termination is plaintiffs deposition testimony which is both summarized and quoted in this order's footnote 2 on page 13. Plaintiff's statement that she did not think that age is why they fired her and her answer of "probably," "I really don't know," and "I can't say for sure" as to sex being the reason for termination certainly does not create a reasonable inference that either age or sex was a factor in her discharge.

Whatever property interest plaintiff had in her employment on the due process claim is determined by Arkansas law. Board of Regents of State Colleges v. Roth 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Last month, the Eighth Circuit in Rogerson v. Hot Springs Advertising and Promotion Comm'n, 237 F.3d 929, 930 (8th Cir. 2001) described it as:

> An at-will employee has no property interest in his employment for Fourteenth

Amendment purposes. See Singleton v. Cecil, 176 Fad 419, 421-22 (8th Cir.), cert . denied, 528 U.S. 966, 120 S. Ct. 402, 145 L. Ed. 2d 313 (1999). ****

The general rule in Arkansas is that either party to an employment relationship may terminate that relationship at-will. Ball v. State Dep't of Community Punishment, 340 Ark. 424, 429-30, 10 S.W.3d 873, 876 (2000). Mr. Rogerson claims that he falls within an exception to that rule because he had a contract of employment for a specified term. See Ball, 340 Ark. 424, 430, 10 S.W.3d at 877 (describing exceptions).

The Arkansas Supreme Court in Ball at 430, 876-77, stated:

There are two basic exceptions to the at-will doctrine: (1) where an employee relies upon a personnel manual that contains an express agreement against termination except for cause; and (2) where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term. den, 292 Ark. at 136, 728 S.W.2d 501.

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Because Ball was an at-will employee, she could have been fired for any reason, no reason, or even a morally wrong reason. Smith v. American Greetings Corp., 304 Ark.

> 596, 804 S.W.2d 683 (1991); Ellison, 58 ArkApp. at 105, 946 S.W.2d 726. Thus, the question of malice on the part of her employer is irrelevant.
>
> Ball also attempts to bring herself within one other narrow exception to the employment-at-will doctrine --the public policy exception. This exception was established in Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380 (1988). In that case, this court held that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. The public policy of a state is found in its constitution and statutes, Wal-Mart Stores v. Baysinger, 306 Ark. 239, 812 S. W.2d 463 (1991), but Ball fails to point us to any statutory or constitutional provisions that would support her argument.

However, the Eighth Circuit in Campbell v. Purtle, 184 F.3d 991, 992 (8th Cir. 1999), although stating that it did not need to decide whether the public policy exception creates a constitutionally protected property right since Campbell had received ample due process before termination, did observe in footnote 3:

> We do, however, note that in all the authority cited by the parties, courts have consistently held that the exception does not create a property right, and at most creates a cause of action for wrongful discharge. See Rojicek v. Community Consol. Sch. Dist., 888 F.Supp. 878,884 (N.D. Ill. 1995); Hughes v. Bedsole,

913 F. Supp. 420, 429-30 (E.D. N.C. 1995); Reitz v. Persing, 831 F.Supp. 410, 414 (M.D. Pa. 1993); DeAngelis v. Lynch, No. CIV.A. 87-4610, 1988 WL 25306, at *3 (E.D. Pa. Mar. 15, 1988) (unpublished); Wulf v. City of Wichita, 644 F.Supp. 1211, 1222(D. Kan. 1986), partially reversed on other grounds, 883 F.2d 842 (10th Cir, 1989).

In their reply, defendants pointed out that plaintiff has not raised any state law causes of action and has not sought leave to amend her complaint to allege a wrongful discharge claim. Moreover, in her objection/response to the qualified immunity summary judgment motion, plaintiff argues a violation of freedom of association with the tenants guaranteed by the First Amendment and her freedom of political expression protected by the Ninth Amendment.

The Court is persuaded that the following language from Ferguson v. Cane Girardeau Co., 88 F.3d 647, 651 (8"' Cir. 1996) should serve as a guide:

> Although amendment of a complaint should be allowed liberally to ensure that a case is decided on its merits, Chesnut v. St. Louis County. Mo., 656 F.2d 343,349 (8th Cir. 1981), there is no absolute right to amend. Thompson-El v. Jones, 876 F.2d 66, 67 (8th Cir. 1989). We review the district court's decision for an abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S. Ct. 795, 802, 28 L. Ed. 2d 77 (1971). In this case, Ferguson never asked the court for permission to amend. Instead, in

> response to the defendants' motion for summary judgment, Ferguson requested that any dismissal be without prejudice to refiling. While the failure to make a formal motion to amend may not be preclusive, see McLaughlin v. Anderson, 962 F.2d 187,195 (2d Cir. 1992) ("the lack of a formal motion to amend is not sufficient ground for a district court's dismissal without leave to amend, so long as the plaintiff has made its wiliingness to amend clear"), the plaintiff s clear willingness is not readily apparent from the record. Moreover, permission need not be granted after undue delay or where amendment would be futile, Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962).

The Court believes that here, too, plaintiff has not made her "willingness to amend clear." It is not clear whether she is seeking to assert a separate state claim for wrongful discharge or is arguing that as a public policy exception in the context of her due process claim. Even after defendants pointed out that she had not alleged any state law claims and had not asked leave to amend, plaintiff never indicated in a subsequent filing that she was intending to raise a separate state wrongful discharge claim. Likewise, it is not clear that her mention of a violation of freedom of association with the tenants and her freedom of political expression in her objection/response to the qualified immunity summary judgment motion was seeking to amend her complaint as well.

Thus, as plaintiff did not have an express employment agreement or a manual providing that she could not be terminated except for cause and longevity of employment is not a basis in Arkansas, plaintiff was an at-will employee who had no property interest in her employment for Fourteenth Amendment purposes. Summary judgment will be granted to defendants on the due process claim.

Even if the Court could find that there was a public policy exception that could create a property interest for plaintiff in her employment, defendants would still be entitled to summary judgment. Plaintiff s own deposition testimony and undisputed facts are that the relationship between plaintiff and Loggains began to change when plaintiff was subpoenaed by an evicted tenant to court to testify around 1993-94 that Loggains was trying to charge the evicted tenant for new doorknobs when ones from an abandoned apartment were used instead; that the matter was settled out of court; that Loggains was not real friendly after that incident; that plaintiff could not say that they did not get along at that point; that their trouble really started with the modernization program ("MOD") at PHA that could have been around 1995-96 approximately a year before her first termination; that when Linda Sifford had been hired to head the MOD, plaintiff made a teasing remark in the break room that she wished that Loggains would hire one of plaintiff's friends; that Sifford got mad and said that the Board, and not Loggains, had hired her; that Loggains called plaintiff in the next morning and said that Sifford told her that plaintiff had accused Loggains of hiring Sifford; that plaintiff responded that she had never said anything about Loggains hiring Sifford; that after that Loggains

started picking on plaintiff for everything; that in the six-months prior to the February 5, 1997 termination, plaintiff and Loggains were not getting along and morale was low; that the morning of February S", Loggains called the maintenance crew in the office to talk about the daily jobs and asked plaintiff to remain; that Loggains said that Barbara Higgons, the office secretary, says you are talking about her kids and plaintiff responded that she was not; that Loggains accused plaintiff of not speaking to everybody in the morning especially Sifford; that Loggains called Higgons into the office and they all talked for a while; that Loggains got mad and said that she was firing plaintiff; that plaintiff then called Loggains a bitch; that Loggains asked her if she was threatening her and that she was going to call the police; that plaintiff said she wanted a written reason for why she was fired, but Loggains said she did not have time to do so; that plaintiff said something to Higgons like thanks for getting plaintiff fired; that plaintiff went to see an attorney and tried to talk to a Board member who would not listen and so she went to another member who said he would see what he could do; that plaintiff stated that she does not know why she was terminated the first time; that she thought the reason was over Sifford, but she really did not know; that she was reinstated with full pay; that Loggains resigned as the Executive Director on April 25, 1997; and that when she was terminated by Tyer on May 21, 1997 for tenant complaints and insubordination she thought the reason was that Loggains had not fired her legally by the personnel policy.

Thus, there is no evidence that plaintiff was fired by Loggains because of being subpoenaed to testify about

the doorknobs. After Loggains later resigned, plaintiff was terminated the second time by Board members with whom she did not have any problems and have not been shown to have had any knowledge of the doorknobs subpoena. Plaintiff has simply not presented facts that she was discharged because of the doorknobs incident and even her own speculation in this lawsuit is belied by her own testimony.

In Shands v. City of Kennett, 993 F.2d 1337, 1347 (8th Cir. 1993), the Eighth Circuit discussed the application of liberty interest as follows:

> An employee's liberty interest is implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges. Kyles v. Eastern Neb. Human Servs., 632 F.2d 57, 61 (8th Cir. 1980). The requisite stigma has generally been found in cases in which the employer has accused the employee of dishonesty, immorality, criminality, racism, or the like. Green v. St. Louis Housing Authority, 911 F.2d 65, 69 (8th Cir. 1990) (quoting Harrison v. Bowen, 815 F.2d 1505, 1518 (D.C. Cir. 1987)); Robinson v. City of Montgomery City, 809 F.2d 1355, 1356 (8th Cir. 1987); Nathanson v. United States 630 F.2d 1260, 1264-65 (8th Cir. 1980) (per curiam). A charge of insubordination alone is normally insufficient to implicate a liberty interest. See K les, 632 F.2d at 61; Nathanson 630 F.2d at 1264 (citing Ventetuolo v. Burke, 596 F.2d 476, 483 (1st Cir. 1979)). Although

> misconduct could conceivably include accusations serious enough to implicate a liberty interest, the general allegation of misconduct in. this case does not by itself rise to the level of constitutional stigma.

Applying the above legal standard to the undisputed facts presented here, no liberty interest was implicated by the reasons of insubordination and tenant complaints in plaintiff s termination. Furthermore, there is no evidence that defendants made any reasons for her termination known to anyone other than plaintiff, expounded on the stated reasons, or gave differing ones.

The final issue is plaintiff s First Amendment claim. Plaintiff was terminated by Loggains on February 5, 1997 and she was advised in a letter dated March 5th from the PHA Board of Commissioners and received by plaintiff on March 7", that she was being reinstated with full back-pay and benefits for the period when she was not on the j ob and she was to report to work on March 12, 1997. On March 11, 1997, plaintiff took a petition around to the tenants o£ the PHA to sign. Hence, there is a question as to plaintiff s status as an employee on March 11 " and she even remarks herself in her objection/response that her petition was circulated while she was technically not an employee of PHA.

However, assuming that plaintiff was an employee on March 11 ", the Court must determine whether the petition was protected speech. The following summary from Belk v. City of Eldon, 228 F.3d 872, 877-879 (8"' Cir. 2000), controls this Court analysis:

Whether the First Amendment shields a public employee from discharge as a result of her speech requires a two-step judicial inquiry. See Shards v. City of Kennett, 993 F.2d 1337, 1341 (8th Cir.Mo. 1993). First, we determine whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); Shands, 993 F.2d at 1342. Second, if the speech addresses a matter of public concern, we balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); Shards, 993 F.2d at 1342. Both inquiries are questions of law for the court to decide. See Connick , 461 U.S. at 148 n. 7,150 n. 10, 103 S. Ct. 1684; Shands, 993 F.2d at 1342.

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Matters of public concern include matters of political, social, and other concern to the community. See id. at. 147-48, 103 S.Ct. 1684. In evaluating speech under the Connick framework, we examine the content, form, and context of the speech as revealed by the entire record. See id.; Shan s, 993 F.2d at 1343.

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Speech that criticizes a public employer in his capacity as a public official also addresses matters of public concern. "Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern." Casey, 12 F.3d at 802.; see Barnard v. Jackson County, 43 F.3d 1218,1225 (8th Cir. 1995) (holding allegations of wrongdoing by public officials are on the highest order o£ First Amendment concern). Heightened public interest in a particular issue, while not dispositive, may also indicate that the issue is one of public concern. See Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 644 (8th Cir. 1983) (holding that media coverage and citizen activism "... are a good indication of the public's interest").

Not every statement made by a public employee about her job addresses a matter of public concern, however, "When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern .... Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment." Buazard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999). In Tuttle v. Missouri Department of Agriculture, for instance, we held that a grain inspector's conversation with his

> supervisor touching on recent worker cutbacks, employment policies, possible increases in salaries, promotions, and safety issues did not address matters of public concern because the employee was speaking solely as an employee. 172 F.3d 1025, 1034 (8th Cir, 1999). Statements that deal with personnel matters are not generally protected by the First Amendment, and statements of "purely academic interest" to the speaker will be given broader protection than those in which she has a personal interest. See Shards, 993 F.2d at 1343.

The Eighth Circuit last month decided Gordon v. City of Kansas City. Mo., F.3d 2001 WL 114699 (8th Cir. 2001), a case which also involved the termination of an employee following her circulation of a petition. The district court held that Gordon's petition and her conduct in circulating the petition was a matter of public concern and could be seen as having a high degree of public interest since it opposed the privatization of some of the city's functions including the Animal Control Division of which Gordon was division head and urged the removal of the city manager and the return of service provisions to the professional staffs. Evidence presented on the public concern prong was that Gordon was concerned that the taxpayers would end up paying more but receive less service, a citizen's complaint to her department about the quality of city services triggered her petition, and the proposal had already been discussed in the news and in churches. The Eighth Circuit affirmed that portion of the district court's ruling as well as the remainder of the ruling that the balance tipped in favor

of the government as an employer considering the time, place and manner of the speech; the petitioning activity being inherently disruptive to workplace harmony; and the petitioning activity adversely affecting her own ability to perform her duties and the efficiency of the workplace. The appellate court analysis and reasoning at *4-5 follows:

> Contrary to appellant's well-presented arguments, we conclude that there is no genuine issue of material fact which undermines the district court's Connick-Pickering analysis. The district court correctly understood that, according to the Connick - Pickering legal framework, it was required to balance appellant's interest in engaging in the protected speech against the interest of the City in promoting the efficiency of the public services performed through its employees. Belk v. City of Eldon, 228 F.3d 872, 880 (8th Cir. 2000) (Belk) (quoting Pickering, 391 U.S, at 568). Factors to be considered in balancing these interests include; (1) the need for harmony in the workplace; (2) the closeness of the working relationship between appellant and her co-workers and the potential impact that the speech in question might have on that relationship; (3) the time, place, and manner of her speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech interfered with appellant's ability to perform her duties. See id. (citing Shands, 993 F.2d 1337)). While the Connick-Pickering

balancing test presents a question of law for the courts to decide, any underlying facts that are material and in genuine dispute must be submitted to a fact finder. Shands, 993 F.3d at 1342. Moreover, if the government employer cannot produce some evidence showing that the employee's speech disrupted the workplace, the court need not proceed to the balancing stage absent special circumstances. Belk, 228 F.3d at 881 (citing Sexton v. Martin, 210 F.3d 905, 911-12 (8th Cir.2000)). "Where there is no evidence of disruption, resort to the Pickering factors is unnecessary because there are no government interests inefficiency to weigh against First Amendment interests." See id. This "disruption" inquiry focuses on whether the speech had an adverse impact on the workplace. See id. (citing Sexton v. Martin, 210 F.3d 905, 911-12 (8th Cir. 2000)).

Proceeding to the disruption inquiry in the present case, it is undisputed that, on or about August 19, 1996, appellant solicited signatures for the petition from her subordinates in the Animal Control Division. At that time, according to appellant's own deposition testimony, she had either direct or indirect control over virtually every aspect of the Animal Control Division's operations, including personnel matters, and she exercised that control with nearly complete autonomy. See Appendix at 96 (deposition of Janice Gordon at 20-22). Therefore, by soliciting the signatures of her subordinates,

appellant presented them with a Hobson's choice--they could defy her wishes or they could sign a petition for the removal of the highest-ranking appointed official in the City administration. Under these circumstances, appellant's conduct amounted to an abuse of power and would inevitably have had an adverse impact on the workplace. Thus, while it may be true that the conduct in question occurred largely "off the clock" and did not interfere with day-to-day operations, and while appellant may not have overtly pressured her subordinates to sign the petition, we agree with the district court that the speech in question was inherently disruptive.

We now turn to the balancing of interests, which, as we have noted, presents a question of law for the courts to decide. We emphasize that the Connick-Pickering balancing test is flexible; the weight given to any one factor is dependent upon the specific circumstances of the particular case. Shands, 993 F.2d at 1344. We also are mindful of the well-established principle that a government employer must be afforded wide discretion and control in its management of personnel matters and other internal affairs. See Connick, 461 U.S. at 151. Government predictions of harm, when used to justify restrictions on speech of government employees, are generally afforded greater deference than such predictions when used to justify restrictions on speech of the public at large. See Waters

v. Churchill, 511 U.S. 661, 671-75, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994).

> Applying these principles, we hold, upon de novo review, that the district court did not err in concluding that the City's legitimate concerns about workplace harmony and efficiency outweighed appellant's interest in engaging in the protected speech -- at the time and place, and, especially, in the manner that she chose. For the same reasons that we agree with the district court that the speech was inherently disruptive, we also agree with the district court that, "[w]hile [appellant's] speech was on a matter of public concern, ... the other factors in the balance are entitled to more weight on the facts of this case and tip the scale in favor of the [City] as an employer." Slip op. at 9. We therefore hold that the district court did not err in granting summary judgment for appellees on the merits of appellant's §1983 First Amendment claim.

Plaintiff has given contradictory testimony in her deposition as to why she was circulating the petition. She testified that she attended a grievance hearing around March 4, 1997; that she received the letter from PHA on March 7" advising that she was being reinstated with full back-pay and benefits for the period when she was not on the job and she was to report to work on March 12, 1997; that when she took the petition to some of the apartments, she told them that they could read and sign it and if they did not, that she would not feel bad towards them; that the petition is dated

March 10, 1997, but she does not know if that was the date; that her purpose in circulating the petition was to show the board members how Loggains was; that this was not after she had been offered her job back and she was terminated at the time; that she consulted the Mayor and he said it was legal and to get as many signatures as she could; that when she went to the apartment of Clark Evans, one of the tenants, who she asked to read the petition and sign or not sign as he wanted, he called a number after looking at the petition, talked real low for a minute, laid the phone down, and went to the PHA office; that she drove the van around to the office and told Evans to give it to her since it was personal property and that he was in trouble; that Evans then went to the police station and said plaintiff threatened him; that the report he filed with the police was dated March 11'"; that she showed the petition to the City Attorney and may have shown it to Smith; that the petition was for the board members, but she did not care to show it to them; that after Loggains was no longer executive director, plaintiff got along fine with Tyer; that Evans filed another report with the police on April 28" against plaintiff for some type of harassment; that Tyer handed her a letter on the afternoon of May 21, 1997, informing her that she was terminated for insubordination and tenant complaints; that she filed a grievance; that she does not think that she was fired for insubordination and tenant complaints, but because Loggains had not fired her legally by the personnel policy; that there was not any evidence presented at the hearing that would have justified her dismissal, but they accused her of passing the petition and driving the company truck around on the company time and she did not know that she was going to get to work then; that she was not trying to get Loggains fired; and that she

was trying to get the board to see what Loggains was doing to people. In her summary judgment response, she argues she was circulating the petition to "build her case to present to the board for reinstatement."

Although the Court is not persuaded by the content, form, and context of the petition/speech as revealed by the entire record that it involved a matter of public concern,fn3 the Court finds that the balance of plaintiffs interest in engaging in the circulation of the petition against the interest of the PHA in promoting the efficiency of the public services it performs through its employees weighs in favor of the PHA as employer. Plaintiff has admitted that morale was low and to making comments that caused conflicts between her and Sifford and then between her and Higgons as well as to those incidents affecting her relationship with Loggains. She also described that the situation between her and Loggains as really deteriorating with her comment that Sifford thought referred to Sifford.

Plaintiff circulated the petition at PHA and it was during normal working hours. While plaintiff contends that she did not know that she had been reinstated at the time, the documentary evidence is that she had received the letter on March 7" notifying her to report to work with restored benefits on March 12'h, that the petition was dated March 10"', and that the police report of Evans' complaint involving plaintiff's circulation of the petition was March 11 `". In her deposition, plaintiff even testified that after Evans took the petition to the PHA office, he then "ran down" to the police station to complain that plaintiff had threatened him. The evidence reflects that the petition only occurred after plaintiff had been terminated the

first time and plaintiff has argued that it was to help her case for reinstatement.

The degree of public interest in the petition apparently involved the plaintiff showing it to the Mayor and some of the tenants including one tenant who was upset by her activity. Evans' action in taking the petition to the office to complain shows the disruption the circulation of the petition caused at least one tenant and the office staff. Moreover, the petition resulted in Evans filing a police report that plaintiff had threatened him with eviction if he did not sign and later filing a second police report that plaintiff had been harassing him since he had taken the petition and given it to management, that plaintiff had swerved a vehicle at him, and that plaintiff had engaged in ongoing harassment. While plaintiff has testified that she told tenants that she would not feel bad towards them whether they signed the petition or not, Evans reported to the police that she had threatened him with eviction and later reported that she had continued to harass him because of the petition including swerving at him with her vehicle.fn4

Therefore, the defendants' legitimate concerns about workplace harmony, efficiency and tenant complaints outweighed plaintiffs interest in the circulation of the petition. Summary judgment will be granted to defendants on this final claim.

Accordingly, defendants' May 26th motion (#23) for summary judgment is hereby granted. In light of this ruling, defendants' July 7th motion (#31) to allow belated filing of a motion for summary judgment based on qualified immunity and July 7th motion (#32) for

summary judgment based on qualified immunity have been rendered moot.

IT IS SO ORDERED this 16th day of March, 2001.

UNITED STATES DISTRICT JUDGE

Footnotes

fn1 Except for listing the Fair Labor Standards Act in the amended complaint, plaintiff has not addressed the legal analysis to be applied nor the act relied upon. Therefore, judgment will be granted to defendants on this claim.

fn2 The Court notes that plaintiff testified in her February 21, 2000 deposition at pp. 79-80 that the only evidence that she was fired because of her age was that the defendants hired a 20-year old in her place, but then she said that she did not think that is why they fired her. On the issue of whether she was terminated because of her sex, plaintiff answered, "Probably. I really don't know. I can't say for sure."

fn3 The Court notes that plaintiff testified that Loggains was mean to and mistreated the tenants because she never went back to see them after she became executive director although she was suppose to be their friend, would go to their house, and would eat with them before becoming director; she did not know how the tenants were mistreated, but she listened to a bunch tell her that Loggains had mistreated them; and she still feels like Loggains was being mean and disrespectful of tenants as she was to plaintiff by putting her in the office working with Loggains.

Furthermore, an entire reading of plaintiff's deposition reveals personality conflicts and gossip involving various PHA personnel that were a source of the frictions. Finally, plaintiff has argued that she was circulating the petition to "build her case to present to the board for reinstatement" which is basically an admission that the petition was a personnel matter and was a reflection of the falling out between plaintiff and Loggains.

fn4 Plaintiff has questioned Evans' credibility by pointing to the various misdemeanor charges against him in the municipals courts of Walnut Ridge and Pocahontas. However, defendants have correctly stated that there is no evidence that defendants knew of any of these charges, some of which were nolle prossed or dismissed, and several of them occurred months and even years after plaintiffs second termination. Moreover, whether Evans' version of events is true or not, the record establishes that Evans went to the PHA office over plaintiffs presentation of the petition, immediately reported a threat to the police, and the next month again filed a report of continuing harassment due to plaintiffs anger over his actions to the petition.

No. 3:99CV00038 GH

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JUDY ALLEN,
Plaintiff

v.

CITY OF POCAHONTAS, ARKANSAS, ET AL.,
Defendants.

JUDGMENT

Filed March 19, 2001

In accordance with the separate order filed this date, summary judgment is hereby entered in favor of defendants.

DATED this 16th day of March, 2001.

UNITED STATES DISTRICT JUDGE

No. 3:99CV00038 GH

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JUDY ALLEN,
Plaintiff

v.

CITY OF POCAHONTAS, ARKANSAS, ET AL.,
Defendants.

ORDER

Filed March 11, 2002

By order and judgment filed on March 19th, the Court granted defendants' motion for summary judgment. On March 28th, plaintiff filed a motion for the Court to reconsider and amend the judgment pursuant to Civil Procedure Rule 59(e) on the grounds that the evidence does not support the findings of fact by the Court, the Court erred in inappropriately applying state case law by overriding a constitutional federally protected right, the Court has decided questions of fact, the Court failed to consider that the Pocahontas Housing Authority ("PHA") was an equal opportunity employer so she was no longer an at-will employee, the Court's decision is unconstitutional as resting on an interpretation of the "judicial power of the United States," the only legal issue should be whether she engaged in the exercise of a constitutionally protected right, the Court's reliance on the petition issue as being disruptive occurred prior

to her being rehired and was only one instance with a resident whose credibility should be decided by a trier of fact, and benefits cannot be denied by the exercise of association rights.

She complains that the Court found there was no evidence that she was fired by Loggains because of being subpoenaed to testify about the doorknobs although the Court acknowledged that plaintiff had 17 1/2 years o£ employment with the Authority with no problems. until she was subpoenaed to court to testify in a lawsuit concerning the eviction of a tenant of the Authority and she was prepared to testify concerning issues of fraud that Loggains was trying to charge the evicted tenant for new doorknobs when ones from an abandoned apartment were used instead. Plaintiff continues that Elwood Smith, the Chairman of the PHA, testified that to his knowledge no tenant had ever complained about the plaintiff and that he also did a personal investigation and determined that the only problem was with Loggains. She states that the Court found that the defendants have articulated legitimate, nondiscriminatory reasons of insubordination and tenant complaints for discharging plaintiff as an employee, but the circumstances upon which these allegations are based occurred prior to plaintiff's s rehiring by the board. Plaintiff also states that while the Court found that the plaintiff had totally failed to prove pretext when the burden shifts back to her, her potential testimony against Loggains concerning fraud establishes motive for Loggains' actions toward plaintiff and her actions are specifically questioned in view of plaintiffs prior 17 1/2 years of employment with PHA without incident.

Addressing the Court's finding that plaintiff was an at-will employee who had no property interest in her employment for Fourteenth Amendment purposes, she asserts that the Court failed to consider that PHA was an equal opportunity employer and she was fired without notice as required by FHA's own acknowledged procedures. Plaintiff notes that after consultation with the Arkansas Municipal League, the Board rehired plaintiff only to terminate her shortly thereafter, but first providing her with the required notice and rights to a hearing. She argues that because of FHA's own procedural requirements, notice and a hearing, plaintiff is no longer just an at-will employee and instead has a property interest in employment. Plaintiff contends that the second termination was merely an act in a series of acts, creating one continuous chain of discriminating events with the second termination merely affirming the first. She maintains that the alleged basis for the second termination was insubordination and the petition, all of which, even if valid, occurred prior to plaintiff being rehired by the Board.

She questions the Court's reliance on the issue of an at-will employee on the Eighth Circuit's decision in Rogerson which refused to consider an Arkansas Court of Appeals' unpublished decision as being unconstitutional.

Turning to the First Amendment issue, she contends that the only legal issue should be whether she engaged in the exercise of a constitutionally protected right. It is not disputed that plaintiff solicited signatures for her petition after her first termination and before her return to work after being rehired so she participated

in the petition process on her own time whether she was technically an employee of defendant which is an exercise of the right to petition, associate and speak. She again asserts that the petition issue occurred prior to plaintiff being rehired and there is a total lack of evidence that the petition was disruptive except as to Evans whose credibility is in issue.

Defendants responded on April 27th that the motion does little more than reiterate the arguments made in the summary judgment response. Noting that plaintiff is raising an argument that the Court's decision is unconstitutional by resting upon an interpretation of the judicial power of the Untied States and cites Anastasoff, they continue that she does not elaborate further how the constitution was violated and so defendants are at a loss as to how to respond to the argument.

The Court had relied upon Ferguson v. Cape Girardeau Co., 88 F.3d 647, 651 (8th Cir. 1996) as guidance as to whether plaintiffs mention of a violation of freedom of association with the tenants and her freedom of political expression in her objection/response to the qualified immunity summary judgment motion was seeking to amend her complaint. The Court noted that just as "the plaintiffs clear willingness is not readily apparent from the record" in Ferguson it was likewise not clear that plaintiff was seeking to amend here. In her current motion, plaintiff has not presented anything to change the Court's analysis.

Regarding plaintiff's charge that the Court erred in finding no evidence that she was fired by Loggains due to the subpoena to testify about the doorknobs, the

Court will not repeat the detailed review of the record contained in the March 19th order finding that there was no evidence that plaintiff was fired by Loggains because of being subpoenaed to testify about the doorknobs and that after Loggains later resigned, plaintiff was terminated the second time by Board members with whom she did not have any problems and have not been shown to have had any knowledge of the doorknobs subpoena. Moreover, the passage of over three years between the subpoena in 1993-94 and her termination in 1997 extinguishes any inference of a connection between the two events. See, Ingram v. Johnson, 187 F.3d 877, 880 (8th Cir. 1999) holding that " ... the seven-month gap between the filing of the lawsuit and the termination by Webb 'weakens the inference of retaliation that arises when a retaliatory act occurs shortly after a complaint.' Smith v. St. Louis Univ., 109 F.3d 1261, 1266 (8th Cir.Mo. 1997)." See also, Lindner v. Nebraska, 12 Fed. Appx. 429, 430 (8th Cir. 2001) ("The facts supporting Lindner's cronyism protest occurred nearly two years before she was demoted a substantial gap in time that defeats the inference that Lindner was punished because of her speech.").

To plaintiff's argument questioning this Court's reliance on Rogerson v. Hot Springs Advertising and Promotion Comm'n, 237 F.3d 929 (8th Cit. 2001) rather than the unpublished opinion in Bonds II, Inc. v. Bratton, 1991 WL 231255 (Ark. App. 1991), this Court is bound to follow the Eighth Circuit's more recent explanation and holding on the issue of due process and an at-will employee. The reasoning in the March 19th order on the lack of a property interest or a public policy exception also applies to the argument of the PHA as an equal opportunity employer especially in

light of the only "evidence" of whether plaintiff was terminated because of her sex was her deposition answer of "Probably, I really don't know. I can't say for sure."

Finally, the Court is satisfied that the March 19th order properly set out the legal framework in addressing plaintiff's First Amendment claim as well as the facts contained in the record. Although the Court was not persuaded by the content, form, and context of the petition/speech that it involved a matter of public concern, the Court found that the balance of plaintiffs interest in engaging in the circulation of the petition against the interest of the PHA in promoting the efficiency of the public services it performed through its employees weighed in favor of the PHA as employer. The Court's analysis did not simply rest on Evans and his credibility in that context was not crucial. As the Court stated at footnote 4 on page 27, "[m]oreover, whether Evans' version of events is true or not, the record establishes that Evans went to the PHA office over plaintiff s presentation of the petition, immediately reported a threat to the police, and the next month again filed a report of continuing harassment due to plaintiff's anger over his actions to the petition."

Accordingly, plaintiff's March 28th motion (#38) to reconsider and amend the judgment is denied.

IT IS SO ORDERED this 6th day of March, 2002.

UNITED STATES DISTRICT JUDGE